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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,

Petitioners

vs.

DONNY BRURELL BUCKLEY, ET AL.,

Respondents

PETITIONERS' REPLY BRIEF

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Cross-Petitioners,

vs.

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF*

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Cross-Petitioners,

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI*

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* Lawrence Petitioners have filed this Reply Brief and Brief in Opposition to the Cross-Petition under an authorization to delay filing the Reply Brief until after receipt of the Opposition Briefs in order to simplify the presentation of the issues. Each brief has here been limited to the applicable page limitations.

CONSOLIDATED TABLE OF CONTENTS

	Page
Petitioners' Reply Brief	
Argument	1
Question 1(a)—The Impact of *Milliken*	1
Question 1(b)—The Requirements of *Arlington Heights*	5
Question 2(a)—The Open Question of *Swann*	8
Question 2(b)—The Effect of *Valtierra*	8
Conclusion	9
Petitioners' Opposition Brief to the Cross-Petition for Certiorari	
Argument	10
Inter-relation Between Intradistrict and Interdistrict Relief	10
The "Inequitable" Burden—Has It Been Established	12
Does IPS Have Standing on This Question	12
The Validity of the Scope of the Remedy Under *Keyes*	13
Conclusion	14
Appendix	A1
Seventh Circuit Order Dated August 7, 1979	A1
Seventh Circuit Order Dated August 23, 1979	A3
Excerpts from District Court Entry of June 2, 1978	A5

CONSOLIDATED TABLE OF AUTHORITIES

Cases:	*Page*
City of Mobile v. Bolden, — U.S. —, 64 L.Ed.2d 47 (1980)	6, 8
Columbus Board of Education v. Penick, 443 U.S. 449 (1979)	13
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977)	3
Evans v. Buchanan, 393 F.Supp. 428 (D.Del.), *aff'd.*, 423 U.S. 963 (1975)	4
Evans v. Buchanan, 582 F.2d 750, *cert. denied*, 48 U.S.L.W. 3696 (April 29, 1980)	4
Green v. Board of Education of New Kent County, 391 U.S. 430 (1968)	10
Hills v. Gautreaux, 425 U.S. 284 (1976)	7
James v. Valtierra, 402 U.S. 137 (1971)	8
Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973)	13
Milliken v. Bradley, 418 U.S. 717 (1974)	3
Propper v. Clark, 337 U.S. 472 (1949)	7
Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971)	8
Village of Arlington Heights v. Metropolitan Development Corporation, 429 U.S. 252 (1977)	5, 6
Washington v. Davis, 426 U.S. 229 (1976)	6

PETITIONERS' REPLY BRIEF

Argument

All three opposition briefs (United States, IPS and Intervenors)[1] assert that Lawrence Petitioners' petition for certiorari ("Petition") raises only the correctness of the lower courts' factual determinations under applicable law—disregarding the Appeals Court majority's departure from the existing authorities of this Court raised in the questions set out in the Petition.[2]

Question 1(a)—The Impact of Milliken. Did the 1969 Indiana General Assembly ("Legislature"), in reorganizing the splintered and over-lapping units of civil government in Indianapolis and Marion County have an affirmative Fourteenth Amendment duty to black students attending IPS schools to lessen the racial differences between that district and the other school districts in Marion County?

Prior to 1969, one method of expanding IPS boundaries was afforded by § 9 of a 1961 school annexation statute applying solely to Marion County providing that an annexation by a civil city or town also constituted a school annexation. This was subject, however, to the substantial statutory limitations set out in the Petition at pp. 8-11.[3] As a practical

1. These abbreviated references refer to the Respondents, United States, Board of School Commissioners of the City of Indianapolis, and Donny Brurell Buckley, et al. "Lawrence Petitioners" refers to The Metropolitan School District of Lawrence Township, Marion County, Indiana, et al.

2. Intervenors' additional assertion that none of the questions raised by Lawrence Petitioners was actually decided by the Court of Appeals (Int. Br. 12) is refuted by the substance of Judge Tone's dissent and by Lawrence Petitioners Appellants' brief and reply brief filed with that court in Cause Nos. 1997-2001.

3. Other methods include and still consist of transfer of territory by agreement of school corporations (IC 20-3-14-3; J.A. 139), unilateral annexation of territory (IC 20-3-14-4; J.A. 141), further reorganization (IC 20-4-1-30) and school corporation consolidation (IC 20-4-8).

School corporations throughout Indiana have for many years been independent of local civil government, and except for Marion County's tenuous boundary connection have had, since reorganization under the 1959 Reorganization Act, boundaries entirely independent of civil boundaries.

matter, however, civil annexation (and, therefore, expansion of IPS by this method) had become impossible because of taxpayer opposition permitted under the school and civil annexation statutes, and the boundaries of IPS had become fixed (Petition 16). At that point IPS, as many inner-city school districts, had a different racial balance than its neighbors, not created, however, by any invidious state action. Some civil government relief from fixed civil boundaries had been obtained by the creation of county-wide districts for the performance of limited functions, but this "solution" created overlapping jurisdictions with resulting inefficiency and confusion. (Petition 12)

In its 1969 session, the Legislature adopted the Uni-Gov legislation to restructure Marion County's chaotic civil government avoiding the problem of annexation by merging the Indianapolis Civil City into a new form of municipal government called a Consolidated City (J.A. 157; § 103), with boundaries extending part-way to the Marion County lines but without extending all city services. The legislation also combined substantial Consolidated City and County legislative and administrative functions. *See,* Petition, 12-13. By extending the boundaries of the new civil city entity by statute (rather than through civil annexation by city council action subject to taxpayer and other remonstrance), Uni-Gov formally rendered civil annexation in Marion County as irrelevant to school boundary change as it had become in practice and as it was throughout the rest of Indiana. At this same 1969 session, the Legislature also repealed Section 9 of the 1961 School Annexation statute by legislative action first commenced in 1967 and described *infra,* p. 7.

While recognizing that there is no duty to adjust differing racial balances as between school districts, both the Court of Appeals majority and the Respondents suggest: (i) the Indiana General Assembly had an affirmative duty to adjust IPS and other Marion County school district racial balances

because its 1969 legislation prevented IPS from dispersing black students from the *de jure* segregated inner-city schools into white suburban areas; and (ii) the Legislature's "discriminatory" refusal to expand IPS had the effect of keeping blacks out of suburban area (U.S. Br. 15; IPS Br. 22).

If the racial differences between school districts are not actionable, and since this Court has held in *Milliken v. Bradley,* 418 U.S. 717, 746, (1974), that

> "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere and . . . the remedy must be limited to that system",

how can a different rule be applied here? Where boundaries had become fixed (as in both IPS and Detroit) without invidious State action, how can a failure to expand boundaries be actionable within the meaning of such cases as *Dayton Board of Ed. v. Brinkman,* 433 U.S. 406, 413-14 (1977)? "Impact" and "intent" come into play only where there is an affirmative duty to act.

The analysis made by the Solicitor General when this case was previously in this Court (October Term, 1976) on substantially the same record is still applicable:[4]

> "The record does not contain direct evidence showing why the Indiana General Assembly chose not to consolidate the school corporations in Marion County, and this is not a case in which acts have a racially disproportionate impact inexplicable in the absence of discriminatory intent. The failure to alter the *status quo* has no independent effect at all. The court of appeals' decision would be correct, therefore, only if a State has an affirmative duty to eliminate racially disproportionate school populations in different school districts. There is no such duty, however, unless the disproportion in the racial characteristics of the students of the different districts was caused by state action."

4. Brief for the United States, Cause Nos. 76-212, 76-548, 76-468, 76-515, 76-520 and 76-522, at pp. 12-13.

Finally both the Court of Appeals and the Respondents (IPS Br. 20-21) assert that where a State chooses to act, it is obligated to do so in a nondiscriminatory manner citing *Evans v. Buchanan,* 393 F.Supp. 428 (D. Del.), *aff'd.,* 423 U.S. 963 (1975). But that case is inapplicable—it involved the constitutionality of a school boundary reorganization statute giving the Delaware State Board of Education the power for one year to consolidate any school corporation without a referendum otherwise required for a consolidation. It specifically excluded from its operations, however, the City of Wilmington and one other school district.

The decision rested not only on the fact that Wilmington had never desegregated its school system since 1954, but on broader bases: that the statute was designed for school boundary reorganization; that until 1954 dual school systems had been mandated throughout Delaware by statute; that interdistrict transfers between Wilmington and the surrounding school districts had been used to effect this required *de jure* segregation for many years, segregation constituting a cooperative venture involving both city and suburbs; and that Wilmington and suburban districts had not been meaningfully separate and autonomous. 393 F. Supp. at 430, 433 and 437. The segregation within Wilmington was not the result of State action limited to its boundaries. Furthermore, as the case entered remedial stages, the underlying theory of the school remedy became firmly rooted in these facts. *Evans v. Buchanan,* 582 F.2d 750, 763-64 (3rd Cir. 1978), *cert. den.* 48 U.S.L.W. 3696 (April 29, 1980).[5]

In contrast, Uni-Gov had no effect on school boundaries; *de jure* segregation was not mandated by Indiana after 1877; except in IPS it was not practiced by any of the school corporations in Marion County; and IPS segregation was

5. See also Justice Brennan's denial of a stay in this case, 430 U.S. 1360, 1362-63 (1978), and a separate lower court action on stay specifically distinguishing the Indianapolis case on these grounds. *Evans v. Buchanan,* 435 F.Supp. 832, 846, n. 48 (D. Del. 1977).

not a cooperative effort between IPS and its neighbors. Further, the changes effected by the 1969 legislation had no effect on school boundaries.

Question 1(b)—The Requirements of Arlington Heights. In determining that the Legislature acted with a discriminatory purpose in adopting the 1969 legislation, did the Court of Appeals majority follow the standards required in *Village of Arlington Heights v. Metropolitan Development Corporation,* 429 U.S. 252 (1977), or any reasonable equivalent?

First, the legislation had no impact. The racial differences between IPS and the surrounding school corporations were created long before 1969 and the adoption of the 1969 legislation. A failure to redress this balance is not discriminatory and does not constitute a constitutional violation.

Second, what is the historical background indicating a series of official action taken for an invidious purpose? Aside from the permitted segregation by law in IPS (not existing generally throughout the State), this consisted of: a series of statutes first adopted in the 1800's limiting blacks' rights, *e.g.* interacial marriage; the failure to enforce the 1885 law against discrimination in public accommodations until the decade prior to 1971, (332 F.2d 661); the failure to admit blacks to public parks until after World War II (Ibid.); with respect to housing, the use of anti-discrimination clauses in deeds or plats and their routine enforcement until 1948 (Id. at 663); prior housing discrimination by realtors; private harassment of blacks buying homes within the Indianapolis area, and newspaper advertisement of "homes for colored" (Ibid.); the adoption of an Indianapolis ordinance in 1926 attempting to separate white and black residential areas declared unconstitutional by a local court soon after its passage (Ibid.); a statement from a monograph that it was common knowledge that in many smaller, and in some larger Indiana communities,

blacks were not permitted to stay overnight, a custom enforced by police action—all without relationship to time or any specified area (Id. at 663); the siting of public housing projects discussed below. Except for the latter, none of these acts were found by the District Court or the Court of Appeals to be a basis for an interdistrict remedy (J.A. 12-13); the state-related incidents are remote in time; and private discrimination is not relevant to a school case. These types of discrimination have been widespread throughout the United States. Basing a school desegregation case on them makes *Washington v. Davis,* 426 U.S. 229 (1976) and *Arlington Heights, supra,* meaningless. *Cf., City of Mobile v. Bolden,* — U.S. —, 64 L.Ed.2d 47, 63 (1980). Neither the Appeals Court majority opinion nor the Respondents thus limit the relevance of these factors. (J.A. 7; IPS Br. 7, U.S. Br. 11.)

Third, the specific sequence of events leading to the 1969 legislation does not indicate discrimination and there was, in the adoption of the 1969 legislation, no departure from the normal procedural sequences. *See,* Dis. Op., J.A. 33, n. 10.

Fourth, contemporary statements by members of the decision-making body indicated racial factors were not involved in the adoption of this legislation.

Fifth, as pointed out in the dissent in detail, the majority's entire finding of intent, even assuming its relevance, is based on (i) a purported change in the substantive policy in the method of changing IPS boundaries to the Indianapolis Civil City boundaries; (ii) without reference as to whether the change was selected in spite of and not because of its adverse effects, if any, upon black students; or (iii) whether the changed policy was considered important by the Legislature strongly favoring a decision contrary to the one reached. *See, Village of Arlington Heights, supra,* 429 U.S. at 267.

It is superfluous to retrace the superb analysis of policy

in the dissenting opinion (J.A. 33-45). One wonders, however, how a court could find a policy "strongly held" by the Legislature when it: (i) had been entirely abandoned throughout all of Indiana under the School Reorganization Act in 1959; (ii) was substantially inoperative under the ameliorating but restrictive provisions of the 1961 School Annexation Act applicable only to Marion County (JA. 139; Petition 9-11), and (iii) was unnecessary to a legitimate and exemplary reform of civil government.

While not crucial to this analysis, the Court of Appeals' majority suggestion that invidious purpose is somehow shown by the repeal in 1969 of § 9 of the 1961 School Annexation Act is fatuous. Section 9 of the Annexation Statute cannot reasonably be read to provide that the operation of Uni-Gov would automatically extend school boundaries under the 1961 Annexation Act to the new Consolidated City's boundaries (Petition 18-19); and the suggestion that this must have been the case because otherwise the repeal would have been futile is equally unreasonable. The legislative repeal of § 9 was commenced in 1967 to prevent the administrative and financial problems incident to tying any school annexation to civil annexation. (See, Dis. Op., J.A. 37-40; Maj. Op., J.A. 10; IPS Br. 9, n. 11.) This statute was promoted by local school corporations, including IPS, in 1967 and was no more futile in 1967 than it was in 1969, whether or not Uni-Gov had been adopted.

While this Court normally gives deference to determinations of the District and Circuit Courts as Respondents argue in supporting this reasoning (U.S. Br. 12, n. 7), it will not do so when such an interpretation of state law is unreasonable. *See, Propper v. Clark,* 337 U.S. 472, 486-488, (1949) in which this Court made a detailed analysis of the involved statutes in determining the reasonableness of the interpretation. Furthermore, this Court has never hesitated to find a Court of Appeals wrong on a factual matter when it was clearly in error. *See, e.g., Hills v. Gau-*

treaux, 425 U.S. 284, 294, n. 11 (1976); *City of Mobile v. Bolden,* — U.S. —, 64 L.Ed.2d 47, 53 (1980). Further, the District Court never adopted the Court of Appeals' majority interpretation of the 1961 School Annexation Act.

The Court of Appeals majority not only failed to find sufficient facts to justify invidious purpose under *Arlington Village* but was clearly erroneous in analyzing the one charge of discriminatory purpose proffered.

Question 2(a)—The Open Question of Swann. Will discriminatory siting of public housing support a school remedy? As noted in the Petition, this is still an open question. The United States agrees (U.S. Br. 19; *cf.,* IPS Br. 18) but argues that HACI's actions here support a remedy because the housing sitings involve school enrollment, but this will be true of any housing violation since school-age children live in housing. Respondents have not answered the question of whether the school corporations, which have no control over housing policy, should be forced to take affirmative action to remedy a failure by any agency which does—the question specifically left open by *Swann v. Charlotte-Mecklenburg Bd. of Education,* 402 U.S. 1, 22 (1971).

Question 2(b)—The Effect of Valtierra. How, consistently with *James v. Valtierra,* 402 U.S. 137 (1971), can the Court of Appeals majority find a discriminatory intent in HACI's location of public housing projects in the 1960's in the civil city of Indianapolis?

Respondents assert that *Valtierra* is inapplicable since proof was there lacking "that race was a factor in any governmental decision" (U.S. Br. 14, n. 14), but this is inaccurate. As shown by the briefs of counsel in that case (28 L.Ed.2d 1092, 1095), it was argued that a failure to accept public housing discriminated against both persons of low income and race. Further, as shown by the District Court's opinion in that case, *Valtierra v. Housing Authority of the*

City of San Jose, 313 F. Supp. 1, 5 (N.D. Cal. 1970), minorities were over-represented in less than standard housing by greater than four-to-one, and occupied nearly one-third of the deteriorating and delapidated housing. The decision had a racial impact but racial purpose was not shown, as it has not been shown in this case (*see,* Petition 24-25).

The majority opinion relies on four factors (J.A. 14), all embellished by Respondents (U.S. Br. 14; IPS Br. 18): First, a history of racial discriminations, noted at p. 5 *supra,* indigenous in much of America where blacks and whites have lived in the same area. Second, the natural and foreseeable consequences of site selection practices, which is another word for "impact" and falls within the rule of *Valtierra.* Third, the absence of convincing non-racial justification for HACI in locating projects outside IPS. As noted in the dissenting opinion, however, it was not HACI's refusal to enter into a cooperation agreement but that of the Marion County Council and Board of Commissioners, as to whose intent there was no evidence. *See,* Dis. Op., J.A. 45-51. Fourth, the discriminatory intent of the Planning Commission in matters "*not directly related to housing*" (Maj. Op., J.A. 14). The Planning Commission, however, had no control over the location of housing which, under Indiana law, was the sole province of HACI (IC 18-7-11-8), subject, under Federal law, however, to the execution of a cooperation agreement by the governing body of the territory where the project was to be located—here, the Marion County Council and the Board of County Commissioners. *See,* Maj. Op., J.A. 15 and 42 U.S.C. § 1415, J.A. 169.

Conclusion. The history of this case, both in the District Court and the Circuit Court of Appeals, is a continuing attempt to broaden the remedy for major city segregation (here IPS) both by standards and findings inconsistent with this Court's prior rulings. Lawrence Petitioners urge that their Petition for Certiorari be granted.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Argument

Inter-Relation Between Intradistrict and Interdistrict Relief. IPS, arguing that the ordered interdistrict relief is discriminatory, treats this relief as separate from the intradistrict relief within IPS ordered to remedy its *de jure* segregation, but this is incorrect.

As a substantive matter, the District Court has consistently held that remedying IPS segregation solely within its borders cannot be ordered because "in the long haul, it won't work," citing *Green v. Board of Education of New Kent County,* 391 U.S. 430 (1968), and that a remedy for this segregation must involve transfer of students to adjoining school corporations. The linking of intra- and interdistrict remedies has been raised by the District Court in each of its various opinions, as follows: 1971 Opinion, 332 F.Supp. at 676, 678; 1973 Opinion, 678 F.Supp. 1191, 1197, 1205 (IPS. App. A17, A33); 1975 Opinion, 419 F.Supp. 180, 184, (S.A. 41-43); 1978 Opinion, 456 F.Supp. 183, 191 (J.A. 84, 98-99); District Court Order of June 2, 1978, Appendix, *infra,* A6-A7.

As a substantive matter, the Court of Appeals, commencing with its 1976 Opinion in 541 F.2d 1211 (vacated and remanded by this Court, 429 U.S. 252), has premised its requirement for interdistrict relief, at least in part, on the necessity of remedying the *de jure* segregation occurring wholly within IPS:

> "The General Assembly, under both Federal law . . . and Indiana law . . . had an obligation to alleviate the segregated condition in IPS. This record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation.: (Citations omitted; 541 F.2d, 1211 at 1220; J.A. 19)

This part of this opinion was used by the District Court in its 1978 remand decision to justify its compliance with *Milliken,* 456 F.Supp. 183, 191 (J.A. 86). Further, the Court of Appeals majority in its 1980 opinion held that the Uni-Gov legislation met the requirements of *Milliken,* (J.A. 4), citing as authority its *1978* plurality decision (573 F.2d 400, 408; J.A. 64-65) where in justifying an interdistrict remedy under *Milliken,* the majority had stated:

> "In what way did the State's choice of retaining the old IPS boundary in lieu of expanding it with the city boundary have a segregative impact? It did so, we think, in curtailing the power of IPS to remedy its own violations. . . . If IPS were recalcitrant about correcting its own violation, the district court could have more readily ordered such dispersal of black school population without curtailment of district lines."

Furthermore, the intra- and interdistrict relief has been linked procedurally. The District Court has refused until now to order complete intradistrict relief without interdistrict relief. Further, the Court of Appeals in orders entered August 7 and August 23, 1979, consolidated the intra- and interdistrict cases (*see,* Appendix, *infra,* A1 and A3), and on August 11, 1979, ordered, at IPS' request, an additional hearing on remedy, holding the interdistrict appeals in abeyance (Appendix with U.S. Br. 1a). This effectively postponed intradistrict relief for a year, while the Court of Appeals considered both intradistrict and interdistrict relief together.

Finally, IPS in its brief in pposition to Lawrence Petitioners' Petition, argues vigorously that the State's involvement in racially discriminatory school actions justified the interdistrict relief (IPS Br. 16-17), and that the Court of Appeals was clearly correct in concluding that the 1969 legislation curtailed IPS power to remedy its own violations. (IPS. Br. 22)

The "Inequitable" Burden—Has it Been Established? Accordingly, the appropriate determination as to whether the District Court's remedial order places an inequitable burden on black students must be judged by the particular facts of the case, both intradistrict and interdistrict, including the number of students and the distance each is bused, the proximity of schools to white and black population, which school are obsolete and may be closed. This is the substance of the authorities cited by IPS, but IPS has never presented evidence on these matters. In fact, its own preferred plan (Plan C) would have generally bused black students from their own districts nine years out of twelve, but would have bused white students from their own districts only three years out of twelve.

Further, until the intradistrict plan currently under implementation and any subsequent interdistrict plan have been fleshed out with students and distances, and the other relevant facts, any conclusions on burden cannot be finally determined.

Among other things, IPS disregards the fact that all the suburban school corporations, except Speedway, do not operate neighborhood schools but drive-in schools with percentages of bused students as high as 91.45% (Dis. Crt. Op. April 24, 1979, J.A. 115-116) and that there was evidence that an influx of additional students would cause an alteration in the assignments of existing students (1979 Tr. 1857, 2089).

Does IPS Have Standing on This Question? Further, one questions the standing of IPS to raise this claim. The injured parties are the black students who are represented by the plaintiffs—The United States, and by the Intervenors, Respondents Buckley, both of whom support the remedial order of the District Court (U.S. Br. 17-18, n. 18; Int. Br. 9-11).

The Validity of the Scope of the Remedy under Keyes. Finally, insofar as an interdistrict violation is based on the 1969 Indiana legislation, Lawrence Petitioners do not understand how its scope could extend county-wide, (as urged by IPS' Cross Petition) justifying an implementing court order under the doctrine of *Keyes v. School District No. 1 Denver, Colorado,* 413 U.S. 189 at 203, 213 (1973). The *de jure* segregative acts of IPS occurred prior to 1970 and wholly within its then-existing boundaries. Any portion added to IPS after 1970 would constitute all or parts of Lawrence Petitioners' districts which have always been operated as identifiable areas separate from IPS where transfers of students between IPS and Lawrence Petitioners were made for limited purposes without racial effect.[6]

Accordingly, there could have been no "reciprocal" effect as between the enrollment in the suburban areas and the enrollment in IPS making some schools more black and others more white.[7]

Columbus Board of Education v. Penick, 443 U.S. 449 (1979), is not contrary as urged by IPS in its Opposition Brief (p. 21). Counsel finds no discussion in that case that the annexed areas were involved or a contention, as suggested by IPS, that they were operated in Columbus as "separate identifiable" areas. Even had these contentions been made, they would have been inappropriate since *de jure* activities of the Columbus Board were systemwide until 1974. *See,* 443 U.S. at 461-463.

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6. IPS at the 1979 hearing introduced evidence of all interdistrict transfers between IPS and other Marion County school corporations from the 1940's. It did not urge, and the District Court did not find, they had a racial effect. IPS took no appeal from the failure to make any such finding.

7. Further, the District Court found that the racial differences between IPS and the surrounding school corporations were not caused by the IPS *de jure* segregation (J.A. 110-133), a finding upheld by the Court of Appeals (J.A. 16-18).

Conclusion. Lawrence Petitioners have urged there is no justification for a remedy involving their school corporations. This question aside, there is no justification for IPS' suggested remedy designed to impair or destroy their existence.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illonois 60604
August 7, 1979.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

United States of America, *Plaintiff-Appellee,* Donny Brurell Buckley and Alycia Marquese Buckley, etc., et al., *Intervening Plaintiffs,* Nos. 78-1800, 78-1871 *vs.* 78-1996 through 78-2006, 78-2039 and 79-1831 through 79-1838 The Board of School Commissioners of the City of Indianapolis, Indiana, et al., *Defendants-Appellants, Cross-Appellees,* The Metropolitan School District of Perry Township, Marion County, Indiana, et al., *Added Defendants-Appellants.*	Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 68-C-225. Judge S. Hugh Dillin

IT IS ORDERED by this court, sua sponte, that these appeals are hereby CONSOLIDATED.

IT IS FURTHER ORDERED that the "MOTION OF APPELLANTS BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., FOR CONTINUATION OF TEMPORARY RETENTION OF RECORD IN DISTRICT COURT PURSUANT TO Fed.

R.App.P. 11(c)'' filed on July 30, 1979, is hereby GRANTED. Any party who needs any portion of the record not lodged in this court's clerk's office for purposes of argument on appeal can copy that portion, certify its correctness by certification of an attorney, and refer to that document as part of the record on appeal for present purposes.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 23, 1979

Before

Hon. Thoms E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

United States of America,
Plaintiff-Appellee,

Donny Brurell Buckley and Alyca Marquese Buckley, etc., et al.,
Intervening Plantiffs,

Nos. 78-1800, 78-1871, 78-1996 through 78-2006, 78-2039, 78-2221, 78-1831 through 79-1838, 79-1874, and 79-1875

vs.

The Board of School Commissioners of the City of Indianapolis, Indiana, et al.,
Defendants-Appellants,

Otis R. Bowen, as Governor of the State of Indiana, et al.,
Added Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 68-C-1225.
S. Hugh Dillin, Judge

This matter comes before the Court on the filing of "MOTION OF BOARD OF SCHOOL COMMISSIONERS (IPS) FOR AMENDMENT OR CLARRIFICATION OF ORDER OF AUGUST 8, 1979, RELATING TO BRIEFING SCHEDULE" on August 17, 1979. No objection to the motion has been filed.

Sua sponte, this Court orders that 78-2221 is consilidated with the other pending cases in this consolidated appeal.

IT IS ALSO ORDERED that the briefing schedule ordered on August 8, 1979 is hereby amended to read as follows:

1. Appellants challenging the district court judgments on the basis of the court's findings on existence of interdistrict constitutional violations shall file their opening briefs on or before Friday, September 14, 1979. Appellants shall file a joint brief on all issues where their positions on the violation issues are the same. Appellants in Nos. 78-1871 and 78-2006 shall file brief with respect to the district court order of June 2, 1978 on or before September 14, 1979. (Added defendants suburban school corporations, state officials and HACI would file by September 14 their appellants' brief or briefs in Nos. 78-1996 through 78-2005, No. 78-2039, Nos. 79-1831 through 79-1838 and 79-1874 with respect to the judgments of July 11, 1978 and July 9, 1979. The United States and the state defendants would file their briefs on the intradistrict remedy issues at this time.)

2. Cross-appellants challenging the district court judgments on the basis of the court's findings on scope and effect of the constitutional violations and the appropriate remedy required to redress the cumulative effects of the violations, and all appellees with respect to all or any part of the judgments appealed, shall fie their briefs as appellees and/or cross-appellents, on or before Friday, October 5, 1979. Appellees shall confer with one another to avoid duplication of argument. (IPS would file by October 5 its brief as appellee in Nos. 78-1996 through 78-2004 and 78-2039 on the violation issues and as cross-appellant on the scope effects and remedy issues in Nos. 78-2005 and 79-1875. IPS would include a supplemental statement as to its present position in No. 78-1800, updating its opening brief filed July 29, 1978. Intervening plaintiffs and any other parties desiring to support any of the Court's judgments in the consolidated appeals, in whole or in part, would also file brief at the time.)

3. Any reply brief of appellants relating to the violation issues or arguments presented in their opening briefs, shall be combined with their briefs as cross-appellees on the scope-effects and remedy issues and shall be filed and delivered to opposing counsel on or before Friday, Ocober

19, 1979. (Reply briefs of the suburban school districts and state officials, as appellants in Nos. 78-1996 through 78-2004, 79-1831 through 79-1838 and 79-1874, and as cross-appellees in Nos. 78-2005 and 79-1875, would be filed October. 19. Any brief of intervening plaintiffs as cross-appellees in Nos. 78-2005 and 79-1875 would also be due at this time.)

4. Any reply brief of cross-appellants as to the scope-effects and remedy issues in Nos. 78-2005 and 79-1875, together with any reply brief of appellants in Nos. 78-1800, 78-1871 and 78-2006 as to intradistrict remedy issues, shall be filed and delivered to opposing counsel on or before Wednesday, October 24, 1979.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

(* * Caption—No. IP 68-C-225 * *)

EXCERPTS FROM ENTRY OF JUNE 2, 1978
S. Hugh Dillin, *Judge*

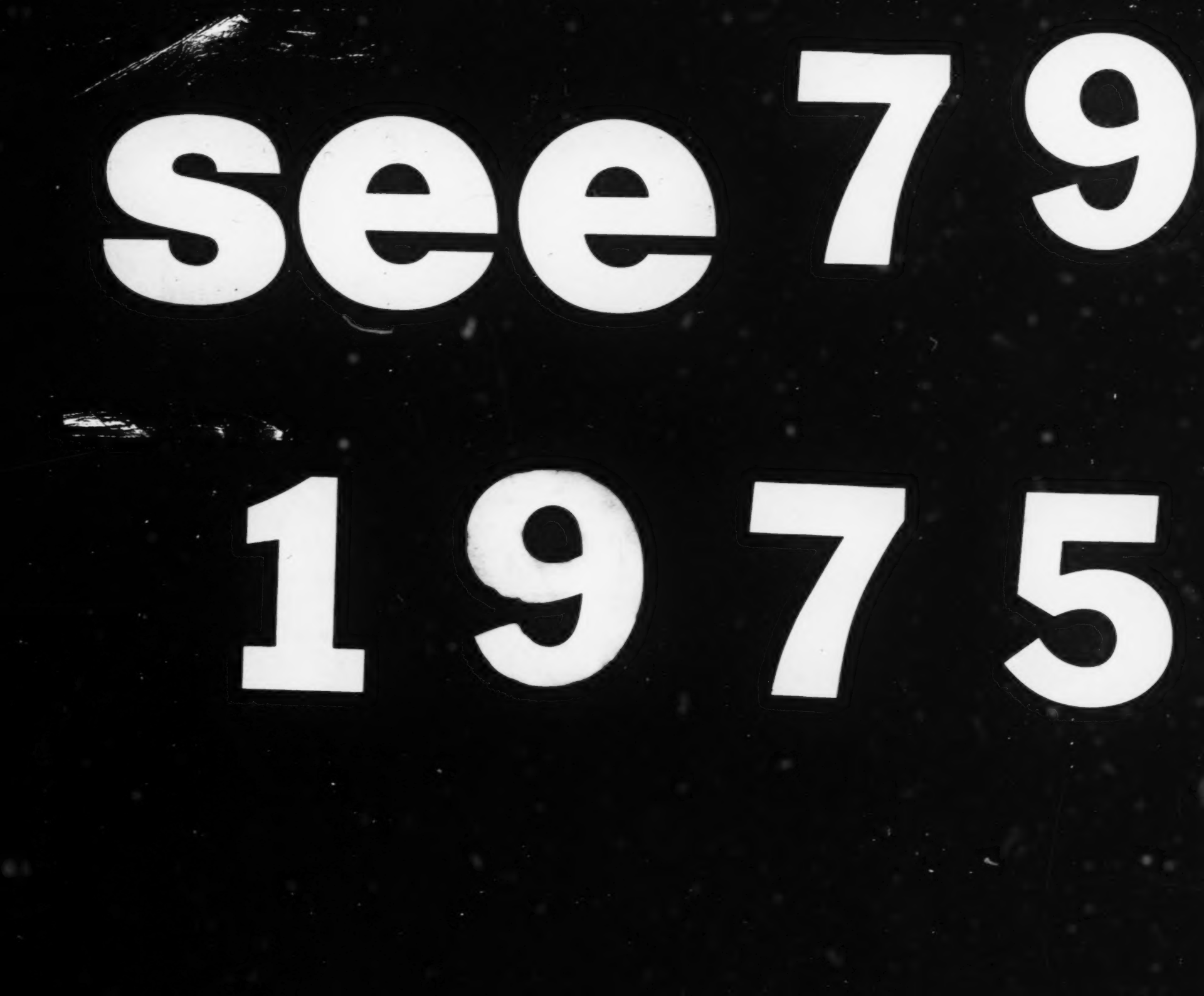
This case comes before the court once again, this time on the order of the Court of Appeals directing this court to give further consideration to its order of April 7, 1978 denying approval of a skeleton desegregation plan proposed by the defendant Board of School Commissioners of the City of Indianapolis (IPS), and intended by it to be implemented for the 1978-79 school year. The plan is referred to by the Court of Appeals as the Proposed Intradistrict Plan, and will hereafter be so styled herein by its initials (PIP).

The Court of Appeals has posed certain questions to this court, which will be answered *seriatim*. However, it also requests that a determination as to the merits of PIP be made independently of the matter of an interdistrict remedy. With all due respect, this court is simply unable to consider one without the other for the very simple reason that the Court of Appeals has already adopted this court's previous findings, based on the evidence, that an interdistrict remedy is the only practical way to desegregate IPS with any prospect of long term success. A recent pronouncement of the Court of Appeals adopting this finding as the law of the case, and criticizing the United States for doing the very thing it is doing in this rather precipitous appeal is as follows:

> "The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning.

"We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken*. It was not an abuse of discretion merely because the Government would have preferred another remedy.

"Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that 'freedom of choice' plans produce negligible results. *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1967)." *United States v. Board,* 541 F.2d 1211, 1223.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